Supreme Court, U.S.
FILED
MAR 26 1992
OFFICE OF THE CLERK

(3)

NO. 91-1227

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MIRIAM DONNER,

Petitioner,

vs.

APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A. a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P. A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

Respondents

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Miriam Donner,
in proper person
P. O. Box 1232
Hallandale, Fla. 33008

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

A. THE JUDGMENT IS FINAL 5

B. THE FEDERAL QUESTIONS WERE PRESERVED FOR REVIEW 10

C. THE COMPLAINT ALLEGES A COGNIZABLE SEC. 1983 CLAIM . . . 14

D. THE COMPLAINT ALLEGES A COGNIZABLE RICO ACTION 17

APPENDIX A1-5

TABLE OF AUTHORITIES

Bowe v. Scott,233 U.S. 658 (1914) 10,11,14

City of Lakeland v. Select Tenures, Inc., 176 So. 274 (Fla.1937) 11

Donner v. Hetherington, 370 So. 2d 1225 (Fla. Dist. Ct. App. 1979) 3

Donner v. Hetherington, 376 So.2d 404 (Fla. Dist. Ct. App. 1979) 3

Douglas v. Alabama, 380 U.S. 415 (1965) 13,14

Grogan v. Platt, 835 F.2d 844 (11th Cir. 1988) 19

Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422 (8th Cir. 1986) 15,16

H.J. Inc. v. Northwestern Bell Tel. Co., 109 S.Ct. 2893 (1989) . . . 18

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 20

Lytell v. McGahey Chrysler-Plymouth, Inc., 180 So.2d 354 (Fla. Dist. Ct. App. 1965) 11

Martinez v. California, 444 U.S. 277 (1980) 20

Meyers v. Hodges, 44 So. 357 (Fla. 1907) 17

Pizzi v. Central Bank & Trust Co., 250 So.2d 895 (Fla. 1971) 11

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979) 19

Ryland v. Shapiro,
708 F.2d 967 (5th Cir. 1983) . . 14,15,20

Sedima, S.P. R.L. v. Imrex Co.,
Inc., 473 U.S. 479 (1985) 19

Silver v. Cormier, 529 F.2d 161
(10th Cir. 1976) 16

Street v. New York, 394 U.S. 576
(1969) 10,12

Spiegel v. Continental Illinois
National Bank, 609 F.Supp. 1083
(D.C. Ill. 1985), aff'd on modified
grounds, 790 F.2d 638 (7th Cir. 1986),
cert. denied, 479 U.S. 987 (1986) . . 18

U.S. v. Vaughan, 797 F.2d 1485
(9th Cir. 1986) 18

U.S. v. Peters, 732 F.2d 1004
(1st Cir. 1984) 18

Vance v. Indian Hammock Hunt &
Riding Club, 403 So.2d 1367
(Fla. Dist. Ct. App. 1981) 11

Amendment I, U.S. Constitution 12

Amendment XIV, U.S. Constitution . . . 17

15 U.S.C. § 15 19

18 U.S.C. § 1963(b)(2) 20

18 U.S.C. § 1964(c) 19

18 U.S.C. § 1983 . . . . . passim

28 U.S.C. § 1257(a) 10

Sup. Ct. R. 15.1 1

Sup. Ct. R. 15.2 1

Sup. Ct. R. 24.2 1

§ 90.201(1), Fla. Stat. 11

Fla. R. App. P. 9.040(e) 14

Fla. R. App. P. 9.210 (b) 14

Fla. R. App. P. 9.210 (c) 14

Fla. R. App. P. 9.210 (d) 14

Fla. R. Civ. P. 1.190(d) 9

Fla. R. Civ. P. 1.530(b) 13

ARGUMENT

This reply addresses new matters raised in response to Donner's Petition.

Contrary to the requirements of Sup. Ct. R. 15.1, 15.2, and 24.2, respondents include in their response a 10-page Statement of the Case that fails to specify "any perceived misstatements of fact" or "any inaccuracy or omission in the [petitioner's] statement" of the case and is in fact devoid of any reference to petitioner's Statement of the Case. Rather, their statement of the case and argument are permeated with misstatements of fact, not supported by the record below, calculated to malign Donner and to trivialize the federal issues sub judice.

For example, at pages 3-4 of their brief and without support in the record below, respondents cite as fact a skewed version of events leading up to Donner's arrest -- that she allegedly "instructed"

Hetherington to arrest her, etc. The only references in the record below to events leading to the arrest are in the complaint. Since the text of that complaint is set out in the appendix to respondents' brief (Resp. Br. A-1-21), the Court may readily verify that the complaint does not allege respondents' version of events to be true.[1]

At pages 7, 8, 33, and 43 of respondents' brief, again without any support in the record below, respondents charge Don-

---

[1] Paragraph 16(iv) of the complaint specifically points out that, in Case No. 76-8301, Donner testified "that Hetherington arrested her immediately without any probable cause and that she did not state that she wanted to be arrested." (Resp. Br. A-13) The complaint further alleges that, among the fraudulently withheld and concealed records were Officer Hetherington's and Sergeant Parker's original written statements, conspicuously omitting any allegation that Donner had expressed a desire to be arrested and confirming that arresting Officer Hetherington made the arrest immediately upon his arrival (without any interval of prearrest observations). [Resp. Br. A-10, para. 9(b)(ii)].

ner with "obstreperous" litigation misconduct, delaying tactics, and abuses of the judicial process in Case No. 76-8301. Ironically, they cite only, and mistakenly rely upon, Donner v. Hetherington, 376 So.2d 404 (Fla. Dist. Ct. App. 1979), an appellate reversal in Donner's favor, holding that Donner did not disobey any court order.[2],[3] To the contrary, the complaint charges the delay to respondents'

---

[2] Respondents' misstatement of the history of Case No. 76-8301 extends as well to their footnote 4. There they incorrectly state that "the case was previously disposed of by way of summary judgment" and that the judgment was reversed in Donner v. Hetherington, 370 So. 2d 1225 (Fla. Dist. Ct. App. 1979). That later-reversed judgment was in favor of just one of the Dade County officers.

[3] Respondents' footnote 6 also misrepresents that Donner is not seeking damages for the "post-arrest" conditions of her incarceration. To the contrary, among the items of damage alleged in her complaint is the diminution of the verdict against Dade County and its correctional officers caused by the unavailability to her at trial of the fraudulently withheld records. (Resp. Br. A-15-16, para. 19-21).

misconduct (Resp. Br. A-6 to A-20). Rather than disputing those charges, the decision below explicitly refrained from passing judgment on which party was at fault for Case No. 76-8301's extraordinary sixteen-year delay.[4]

At page 47 of their brief, respondents grossly distort, and attempt to trivialize, the complaint's detailed charges of respondents' course of fraudulent misconduct by misrepresenting that

---

[4] The complaint's charge, that respondents were guilty of dilatory misconduct, is reinforced by respondents' concession, at page 9 of their brief, that, in response to a writ of mandamus awarding access to those public records, "the requested records were" (first) "produced on August 19, 1985." They conveniently skip over the complaint's allegations that pretrial discovery orders entered in 1978 had long since mandated production of those records and that in 1976-1978 they had previously misrepresented those records to be non-existent. Instead, at pages 8-9 of their brief, they seek to excuse the delay by referring to their objections to access to public records (interposed and overruled in that mandamus proceeding instituted years later in 1981).

> ... the only thing that the complaint alleges is that the INITIAL DEFENDANTS and THE ATTORNEYS answered interrogatories and requests for production which answers the Petitioner alleges were untrue, and hindered her ability to win her case.

This same pattern of misrepresentation is also evident at page 27 of respondents' brief. There, they assert that the term, "under color of state law," appearing in the complaint, is "primarily addressed to the conduct which gave rise to the initial litigation." Not so. Paragraphs 8, 16(vi), 22(a), and 24 of the complaint each allege that the acts of misconduct that gave rise to the claims sub judice were "under color of state law."[5]

A. THE JUDGMENT IS FINAL

At page 12 of respondents' brief, they concede that the Third District based its affirmance of the dismissal with prej-

---

[5] That term is used to describe "conduct which gave rise to the initial litigation" only in para. 3 of the complaint.

udice upon an immunity for conduct in litigation but in the very next breath they attempt to qualify that affirmance by stating that the Third District

> "...invit[ed] the Petitioner to amend her complaint in the original 1976 litigation to seek redress for her grievances in connection with the discovery and other litigation conduct which took place in that 1976 proceeding."

That false interpretation of the affirmance resurfaces again at pages 31-32 of respondents' brief, where respondents state that the Third District ruled

> "... if, the Petitioner does or may have a cause of action, state or federal, that it is properly brought in the initial 1976 litigation where the alleged misconduct occurred."

To the contrary, the very first paragraph of the Third District's opinion clearly states that the dismissal with prejudice is affirmed and footnote 3 to that opinion merely adds:

> "Our affirmance should not be read to bar Ms. Donner from seeking to amend her complaint pending in the circuit court ..."

Nowhere in that footnote did the Third District suggest what manner of claim might be pled by way of amendment in Case No. 76-8301, much less that Donner had carte blanche to propose an amendment -- cancelling out the effect of its "affirmance" of the dismissal "with prejudice" and of its ruling that the complaint "failed to state a cognizable claim" -- by repleading "a cause of action, state or federal," for the very same litigation misconduct that (respondents concede) the Third District had held to be immunized. (See also discussion at footnote 15 of the Petition for Writ of Certiorari).

Respondents further compound their confusion by advancing, at page 33 of their brief, the following second alternative theory:

> "The District Court must have determined that any federal question ... was not properly brought procedurally. Said cause of action, if any, must be brought in the 1976 litigation by way of an amended complaint."[6]

That second theory is manufactured out of whole clothe. Respondents have cited no supporting Florida or federal authority -- in support of their novel theory that the Third District determined that, "procedurally," the federal causes of action are uniquely required to be pled in Case No. 76-8301. Indeed, no such peculiar

---

[6] That second theory, limited to just federal causes of action, diverges from respondents' first theory, quoted ante, that the Third District ruled that Donner's "cause of action, state or federal, ... is properly brought in the initial 1976 litigation ..." (Emphasis added). Nowhere in that opinion can one decipher any language hinting that either the Third District's affirmance of the blanket dismissal with prejudice or its ruling that "the complaint ... failed to state a cognizable claim" drew any distinction between the state-law-based claims and the federal claims pled in the complaint.

authority exists.[7]

These conclusions are supported by the motion for clarification filed in the court below by respondents (appellees) Appalachian, et al. (and reproduced in the appendix, post). In that motion, respondents reported their "understanding" to be that footnote 3 to the Third District opinion

> "...is not to be construed as granting leave ... to amend ... to sue the attorneys involved in the previous lawsuit for a cause of action arising out of statements or writings alleged to have occurred during the course of the previous judicial proceedings."

Respondents' argument that said foot-

---

[7] Fla. R. Civ. P. 1.190(d) provides only that, "upon such terms as are just," upon motion of a party "the court may permit him" to serve a "supplemental pleading setting forth transactions or occurrences ... which have happened since the date of the" original complaint. Neither that rule nor any other mandates that a cause of action arising out of occurrences subsequent to the original complaint be added as a supplemental pleading rather than being pled in a separate suit.

note 3 renders the affirmance not a "final" judgment within the meaning of 28 U.S.C. § 1257(a) is thus without merit.

B. THE FEDERAL QUESTIONS WERE PRESERVED FOR REVIEW

On the issue of whether Donner preserved the federal questions at the Florida state court level for review by this Court, respondents ignore Street v. New York, 394 U.S. 576 (1969) and instead cite several older cases. The only one of those citations meriting discussion is Bowe v. Scott, 233 U.S. 658 (1914).

In Bowe, a Virginia state trial court dismissed a bill for failure to state a cognizable claim. On appeal, plaintiffs omitted any federal question from their assignments of error. The dismissal was affirmed without mention of a federal question. In that appeal, the petition for rehearing, citing the federal question, was denied without addressing that federal question. The attempt to seek review in

the U.S. Supreme Court was dismissed, in the absence of a federal question.[8]

The case at bar is readily distinguishable from Bowe, 233 U.S. 658. Donner's Petition, at pages 24-26, discusses the Florida cases and statute[9] that require Florida courts, in ruling upon a motion to dismiss a complaint for failure to state a cognizable claim, to take judi-

---

[8] In Bowe the bill contained a merely conclusory allegation that a city ordinance conflicted with section 10, article I, of the U.S. Constitution. Though the bill claimed the ordinance impaired the obligation of a contract to which one Shafer was a party, the bill failed to allege that plaintiffs were in privity with Shafer. The bill's reference to due process violations could have been referable to state, not federal, due process guarantees. After the trial court decided the case, the motion for leave to amend the bill again failed to articulate a claimed federal right.

[9] City of Lakeland v. Select Tenures, Inc., 176 So. 274,277 (Fla.1937); Vance v. Indian Hammock Hunt & Riding Club, 403 So. 2d 1367,1369 (Fla.Dist.Ct.App.1981); Sec. 90.201(1), Fla.Stat.; Pizzi v. Central Bank & Trust Co.,250 So.2d 895 (Fla.1971); Lytell v. McGahey Chrysler-Plymouth, Inc., 180 So.2d 354,355 (Fla.Dist.Ct.App. 1965).

cial notice of the federal statutes applicable to the ultimate facts pled therein without any need to plead the statutory citations; no comparable Virginia state court authorities were noted in Bowe.[10] In contrast to the defective allegations of Bowe's bill, complaint alleges ultimate facts, constituting the elements of § 1983 and RICO claims, and additionally employs "words of art" peculiar to such claims.[11]

---

[10] The later decision of Street v. New York, 394 U.S. at 581-584 looked to New York state law on the issue of whether the federal question had been preserved at the New York state trial court level.

[11] Paragraphs 8, 16(vi), 22(a), and 24 of the complaint allege respondents' misconduct was "under color of state law" in furtherance of "a conspiracy" to which the City, its attorneys, and its insurer were parties. Paragraph 30 alleges that the said misconduct damaged Donner's pending "civil rights" claims and paragraph 3(a) alleges that those civil rights claims involved violations of "First Amendment rights to picket." Paragraph 8 alleges that the "pattern of fraudulent misrepresentation" was accomplished "in conspiracy with one another" via "service by mail of papers through the U.S. Postal Service."

Secondly, within the ten days allowed for motions for rehearing under Fla.R.Civ. P. 1.530(b), Donner filed a motion for rehearing and addendum thereto (reproduced in the appendix to respondents' brief), redirecting the trial court's attention to the fact that her complaint pled

> "... an action under 18 U.S.C. Sec. 1964 (c) (Civil RICO), based upon defendants' alleged use of the mails in furtherance of their alleged pattern of conduct" and
>
> "... a cause of action under 42 U.S.C. Sec. 1983."

(Resp. Br. A-29, 32). Douglas v. Alabama, 380 U.S. 415, 422 (1965) holds:

> ... an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here.

Donner's motion for rehearing and addendum likewise brought the "federal error to the attention of the trial court" in ample time for the trial court "to take appro-

priate corrective action" and therefore should stand on the same footing as the timely "objection" approved in Douglas. That is distinguishable from Bowe's earlier holding that, at the appellate level, a federal question raised for the first time by petition for rehearing came too late.

Lastly, in contrast to the assignments of error required in Virginia when Bowe was decided, Fla. R. App. P. 9.040(e) provides that, on appeal, "[a]ssignments of error are neither required nor permitted." Fla. R. App. P. 9.210 (b), (c), and (d) require only that the issues be briefed. Donner timely and fully briefed those federal questions as issues on appeal.

C. THE COMPLAINT ALLEGES A COGNIZABLE SEC. 1983 CLAIM

On the issue of whether the complaint states a § 1983 claim, respondents' efforts (at page 44 of their brief) to distinguish Ryland v. Shapiro, 708 F.2d 967 (5th Cir. 1983) are misdirected. They mis-

takenly argue that "the plaintiff in Ryland did not bring any cause of action for wrongful death whatsoever" as a result of defendants' misconduct. The Rylands' complaint alleged rather that the filing of Rylands' wrongful death action was "delayed" (just 11 months), not foreclosed, by defendants' misconduct. Ryland, 708 F. 2d at 972-975 expressly recognizes a constitutional right of "meaningful" access to the courts and a § 1983 claim for litigation-delay-induced damages caused by wrongful conduct under color of state law.

Equally misdirected is respondents' effort to distinguish Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422 (8th Cir. 1986). In Harrison, the Eighth Circuit likewise recognized, and approved Harrison's § 1983 claim for "infringement" of, his constitutional right of access to the courts. Harrison's access to the court was interfered with, not

foreclosed, by the Commission's retaliatory counterclaim. Harrison, 780 F.2d at 1428 n.9 cites with approval Silver v. Cormier, 529 F.2d 161 (10th Cir. 1976), holding such interference actionable even though "not actually effective." It makes no difference, substantively, whether that "interference" is caused by retaliatory misconduct as in Harrison or by defendants' "fraudulent" misconduct here at issue.

At pages 48-49 of their brief, respondents mistakenly state that the complaint charges damage to just one federal right, Donner's access to the courts; they overlook the fact that the complaint also charges damage to a second federal right: her § 1983 "civil rights actions" pled in Case No. 76-8301.[12]

---

[12] Case No. 76-8301 involved Sec. 1983 damage claims for the misconduct of the City and County and their personnel "under color of state law" that infringed upon Donner's "civil rights" (her "First Amend-

On the issue of privilege, it is significant to note that respondents cite not a single pre-1871 case, much less a pre-1871 case recognizing a common-law privilege in a context similar to the facts alleged in the complaint at bar. Respondents' oldest cited case is Meyers v. Hodges, 44 So. 357 (Fla. 1907); Meyers is distinguishable because it applied a privilege only in an action for defamation.

D. THE COMPLAINT ALLEGES A COGNIZABLE RICO ACTION

Respondents' attempted analysis of Donner's RICO claim is also replete with error. At pages 39-41 of their brief, they preface their analysis with a false assumption, that RICO applies only to organized crime. Then they shift ground by arguing that RICO applies just to crimes

---

ment rights to picket" and "petition" and her Fourteenth Amendment rights not to be "falsely arrested" and not to be subject to cruel and inhumane conditions of imprisonment).

"traditionally considered criminal in nature" and on that basis seek to distinguish U.S. v. Vaughan, 797 F.2d 1485 (9th Cir. 1986) and U.S. v. Peters, 732 F.2d 1004 (1st Cir. 1984). That narrow construction of RICO was rejected in H.J. Inc. v. Northwestern Bell Tel. Co., 109 S.Ct. 2893, 2903 (1989). So confused are respondents that they mislabeled Peters, 732 F.2d 1004 as a RICO action. Rather, Peters affirmed a mail fraud conviction. One count of that conviction was for mailing fraudulent answers to interrogatories in civil litigation.[13]

Respondents erroneously argue that

---

[13] Respondents cite an alternative holding in "Spiegel v. Continental Illinois National Bank, 609 F.Supp. 1083 (D.C. Ill. 1985)," exempting attorneys from "mail fraud" for litigation-related correspondence, but they fail to cite that case's subsequent history; on appeal, at 790 F.2d 638, 649 n.11 (7th Cir. 1986), cert. denied, 479 U.S. 987 (1986), it was held that there was no fraud, so that the said lower-court, alternative holding was superfluous.

the complaint does not allege damage to "business or property" under 18 U.S.C. § 1964(c). That wording is modeled after 15 U.S.C. § 15, Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 485 (1985). Reiter v. Sonotone Corp., 442 U.S. 330, 337-342 (1979) read the word "property" in § 15 expansively and refused to restrict it just to "commercial" property. Grogan v. Platt, 835 F.2d 844 (11th Cir. 1988), upon which respondents rely, noted a distinction between "property" and "person" and disallowed a RICO personal injury claim for wrongful death. By contrast, the complaint at bar seeks compensation for damage to Donner's "rights of action" pled in Case No. 76-8301 -- separate and distinct from the underlying personal injuries upon which those rights of action are grounded.[14] Those "rights of action" are

---

[14] Grogan would bar RICO damages only for Donner's mental anguish and headaches allegedly caused by the litigation delays.

"property." Ryland, 708 F.2d at 972-973, held a wrongful death action to be "property" under the due process clause, and cited Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982) ("The hallmark of property ... is an individual entitlement grounded in state law, which cannot be removed except 'for cause'"). Logan, at 428, n. 4, cites Martinez v. California, 444 U.S. 277, 281-282 (1980), postulating "a state tort claim" as "property." Another section of RICO, 18 U.S.C. § 1963 (b)(2), likewise refers to "property" as including "rights" and "claims."

Miriam Donner

MIRIAM DONNER, Petitioner

NO. 91-1227

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MIRIAM DONNER,

Petitioner,

vs.

APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & KNIGHT, P.A. a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P. A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

Respondents

APPENDIX TO PETITIONER'S REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
CASE NO: 90-1222

F.B.N. 331902

MIRIAM DONNER,

Appellant,

-V-

APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, CITY OF MIAMI, VERNON HETHERINGTON, FOWLER, WHITE, BURNETT, HURLEY, BANICK & kNIGHT, P.A. a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

Appellees
_____/

MOTION FOR CLARIFICATION OF DECISION

COME NOW the Appellees, APPALACHIAN INSURANCE COMPANY, a Rhode Island corporation, FOWLER, WHITE, BURNETT, HURLEY, BANICK & kNIGHT, P.A. a/k/a FOWLER, WHITE, BURNETT, HURLEY, BANICK & STRICKROOT, P.A., a Florida professional association, PHILLIP W. KNIGHT, and MICHAEL J. MURPHY,

and pursuant to Rule 9.330, Florida Rules of Appellate Procedure, respectfully file this Motion For Clarification Of Decision of the Honorable Court dated May 7, 1991 and would state:

1. In the Appellate decision, the Honorable Court affirmed the Trial Court's Order Dismissing Plaintiff's Complaint With Prejudice holding that the Complaint failed to state a cognizable claim.

2. Note 3 to the decision states:

> Our affirmance should not be read to bar Ms. Donner from seeking to amend her Complaint pending in the Circuit Court or from asking the Trial Court to impose sanctions against the Defendants for their alleged misconduct in the discovery proceedings.

3. It is Appellee's understanding that note 3 is not to be construed as granting leave for Appellant to file an Amended Complaint or a Motion for

Sanctions in the same action in which the Complaint at bar was filed and from which this appeal was taken (Case No: 89-37625 CA17). It is Appellee's understanding that note 3 is simply stating should Ms. Donner seek to move the trial court to impose sanctions, such Motion to Amend or Motion to Impose Sanctions are to be filed in Case No: 76-8301 which is presently pending in the Eleventh Judicial Circuit in and for Dade County, Florida. Whether or not an Amended Complaint states a cognizable claim or whether or not any Motion for Sanctions should be granted will then be ruled upon by the trial court.

4. It is also Appellees understanding that note 3 is not to be construed as granting leave to the Appellant to amend her Complaint to sue the attorneys involved in the previous lawsuit for a

cause of action arising out of statements or writings alleged to have occurred during the course of the previous judicial proceedings. The holding of the Honorable Court's decision of May 7, 1991 is that statements or writings alleged to have been made by attorneys during the course of judicial proceedings enjoy absolute immunity and cannot be the basis of a cause of action.

5. In an abundance of caution, and to avoid any confusion, Appellees respectfully request the Honorable Court for an Order clarifying note 3 of the Court's Decision file May 7, 1991.

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing motion was mailed this 14th day of May, 1991 to: MARK A. TROP. ESQUIRE, Attorney for Appellant, Baypoint Suite 830, 4770

Biscayne Boulevard, Miami, Florida 33137 and DAVID KLEINBERG, ESQUIRE, Attorney for City of Miami and Hetherington, 4601 Ponce de Leon Boulevard, Suite 100, Coral Gables, Florida 33146.

Respectfully submitted,

CORLETT, KILLIAN, OBER, HARDEMAN & LEVI, P.A.
Attorneys for Appellees
116 West Flagler Street
Miami, Florida 33130
Tel: (305) 377-8931

RICHARD J. SUAREZ